



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

September 8, 2005

UPPER ANTELOPE CREEK WATER USERS
c/o TOM WADDOUPS
4253 ANTELOPE ROAD
MOORE, ID 83255

Re: Letter received 8/18/2005 regarding Big Lost River Mitigation from Antelope Creek

Upper Antelope Creek Water Users:

This letter responds to your letter received by the Idaho Department of Water Resources (IDWR) on August 18, 2005 requesting a meeting to discuss several issues related to Antelope Creek and mitigation to the Big Lost River. If this letter does not fully address your concerns, I or other IDWR personnel are willing to further discuss the issue.

You state in the letter that your "concern is in the execution of the plan, which led to events in 2005 that may change the way Antelope Creek water is used in the future." I do not know what "plan" you are referring to. You discuss mitigation in subsequent sentences, but some of the specific activities discussed are not related to mitigation, but are water delivery actions of the watermaster. As a result, I interpret your main inquiry to ask how the use of water diverted from Antelope Creek will change because of closer regulation and because of mitigation activities.

In a letter dated August 31, 2005, IDWR explained deliveries of Antelope Creek water and the method for determining whether a delivery call is futile. A copy of that letter is enclosed. Antelope Creek water is administered in priority with the Big Lost River when the creek is connected to the river and the river is connected to the Moore Diversion. When either the creek fails to connect or the river disconnects, Antelope Creek is administered separately from the river. However, if a holder of a senior Big Lost River water right calls for delivery of his water right, rights on the river and tributaries (including Antelope Creek whether or not it is connected), junior to those being called for must be curtailed in an attempt to provide that water or to determine if the call is futile.

You asked in your letter "...when Antelope Creek disconnects and is administered separately and an Antelope Creek water user pursuant to IDAPA 37.03.11.040 makes a call; does the call affect all reaches of Antelope Creek including surface and groundwater users at the mouth of the creek?" The answer is that the call affects water users upstream of the user making the call. Junior groundwater users who mitigate could continue to divert out of priority.

In the same paragraph, you also asked "Do Antelope Creek surface water users have the right to exercise their senior water rights as Big Lost River water users have when Antelope Creek is connected?" An Antelope Creek water right holder may make a call on junior water rights upstream on Antelope Creek and tributaries. Junior groundwater rights are also subject to a delivery call filed under the

Conjunctive Management Rules unless the junior ground water right holders mitigate for the depletions caused by ground water pumping.

You cited a motion during the Water District 34 Advisory Board meeting on May 19, 2005 to use Antelope Creek water to satisfy the first 1/3 of the mitigation requirement. Use of water from Antelope Creek for mitigation purposes must not injure water rights, and must be in accordance with the law and any applicable rules. Groundwater users on Antelope Creek may accrue mitigation credit only according to an approved mitigation proposal. One acceptable form of mitigation may be non-use of all or a portion of a surface water right and idling of acres irrigated based on the amount of water delivered for mitigation. The surface water users proposing mitigation must have either (1) transferred the surface water right for flow augmentation of the Big Lost River, or (2) transferred the water right, or portion thereof, directly to the senior right holders who requested mitigation.

You question the unusual distribution of water on Antelope Creek this spring (shutting off diversions, not diverting to the Hanrahan). It is our understanding that water was not delivered to the Hanrahan until right holders on that ditch called for water. An 1879 priority water right on the Hanrahan should not have been curtailed in order to deliver water to 1883 priority rights at the Moore Diversion on the Big Lost River.

The letter also lists seven other questions/issues. I will address each of these separately:

1. *Could IDAPA 37.03.12.050.01 (Rule 50) be applied to groundwater users at the mouth of Antelope Creek where the burden of proof would be placed on the groundwater users to show to the satisfaction of the director that well construction or location does not effect the flow and sub-water level of Antelope Creek?*

Yes. This rule applies to all ground water rights in Water District 34 except, as the rule notes, those ground water rights containing a remark noting that the right will be administered as separate from the Big Lost River and tributaries. The only ground water rights that have such a remark are those located south of the "A" line, which is an east-west line located near Arco.

2. *Is Direct Interference IDAPA 37.03.12.050.05 a viable option where a junior groundwater user at the mouth of Antelope Creek causes curtailment and damages to senior surface water rights through the process used to provide mitigation burdens to the Big Lost River while continuing out of priority diversions?*

This rule merely allows a senior surface water right holder to seek curtailment of a junior priority ground water right if the senior surface water user can prove that pumping of ground water under the junior right directly interferes with diversion of the senior surface water right.

3. *Connectivity of Antelope Creek to the Moore Diversion was established in 2005 by discontinuing Antelope Creek water diversions for a time period but no quantities were specified as required above the Mackay Dam and to some extent on Alder Creek. Would it be reasonable to require river flow and time to prevent unreasonable waste (IDAPA 37.03.12.020.04) to Antelope Creek connectivity as it is applied above the Mackay Dam (IDAPA 37.03.12.020.01)?*

The watermaster regulated junior diversions on Antelope Creek in 2005 in accordance with the prior appropriation doctrine and Idaho law. There are no general provisions decreed in the Snake River Basin Adjudication or any former decrees that specify time periods, flows, or other conditions relative to

delivery of water on Antelope Creek, or connectivity between Antelope Creek and the Big Lost River. The process for determining if a call for delivery of Antelope Creek water to the Big Lost River is futile is outlined in Section 7.6 of the Water District 34 Guidelines for Operation, and further discussed in a letter to Bob Duke dated August 24, 2005. The letter and a copy of Section 7.6 are attached for your reference.

4. *In order to prevent frivolous calls for water, it would be beneficial if petitioners were required to show proof of material injury as per IDAPA 37.03.11.040.01 and reasonable exercise of rights, IDAPA 37.03.11.040.03. Considering injury and quantifying unreasonable conveyance waste and amount of water at the place of use for benefit and a procedure to implement these rules may prevent the destructive effect on an entire valley.*

The rules cited, IDAPA 37.03.11.040.01 and IDAPA 37.03.11.040.03, are conjunctive management rules that apply to responses to delivery calls made by senior priority surface water or ground water right holders against junior priority ground water right holders. I assume your use of the words "frivolous calls" refers to calls by senior surface water right holders on the lower Big Lost River requesting regulation of junior surface water rights on the Big Lost River and its tributaries. Administration of water between surface water users is not governed by the conjunctive management rules. A futile call determination may address the concerns about "unreasonable conveyance waste" and availability of water at the senior right holder's place of use. Again, the process of determining a futile call is outlined in Section 7.6 of the Water District 34 Guidelines for Operation, and further discussed in a letter to Bob Duke dated August 24, 2005.

5. *When requesting a change in a water right is the burden of proof on the petitioner to prove the proposed change:*

Will not injure other water rights,

Does not constitute an enlargement of the original water right,

Is a beneficial use,

Is consistent with the conservation of water resources within the State of Idaho, and

Is in the local public interest?

Will Antelope Creek water users have the opportunity to object and will IDWR schedule a hearing or will the Director determine if the five requirements are met?

When evaluating a change in a water right (a water right transfer) the director is required by Section 42-222, Idaho Code to evaluate the items listed above. Any person can protest a water right transfer application if the protest is filed timely and the required protest fee is paid at the time the protest is filed. The protest creates a contested case. When a protest against an application for transfer creates a contested case, the applicant bears the burden of proof at the hearing. If IDWR approves a transfer without a hearing, any person aggrieved by a decision of IDWR may request a hearing before the Director within 15 days of the date of the decision. If a hearing is requested for an approved transfer where a hearing has not been held, the person requesting the hearing likely bears the burden of proof. Final decisions issued by the Director can be appealed to a district court.

6. *Temporary changes to the use of water rights during drought conditions provide a hearing if a request for a temporary change is denied. Is there any recourse through IDWR for water users that are injured by the process of water delivery, which enhances connectivity of Antelope Creek to the Big Lost River and the shutting down of Antelope Creek water Diversions?*

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Water should be delivered from Antelope Creek by priority and in conformance with Idaho water law and any applicable rules. IDWR encourages users to first address all water delivery concerns or problems to the water district water master, as provided in Section 4.0 of the Water District 34 Guidelines for Operation. Water users may file a complaint with IDWR regarding any action, omission, or decision of the agency, including direction provided to the local water district watermaster. Complaints filed with IDWR can be treated as a contested case in accordance with IDWR Rules of Procedure (see IDAPA 37.01.01.006). IDWR may grant a hearing or respond to the complaint in a manner that is satisfactory to the complainant.

7. *It was noted that after the Jensen's call for water this spring, the Mackay Dam was still storing water at the ratio of 9 to 1 of input of water to output. This was happening after all water distribution was curtailed on Antelope Creek. Why isn't this water used to satisfy the call for water? General provision 3G as explained in a letter dated May 16, 2002 by David R. Tuthill and clarified in option C from notes of a meeting on April 30, 2002 should also be applicable to Antelope Creek. Curtailment of water has the same affect on the Antelope Valley as it does above the Mackay Reservoir.*

The Jensen and Ashton delivery call was dated May 3, 2005. On May 6-10 the reservoir released water at a rate approximately equal to the inflow to deliver water to the Jensens and Mr. Ashton. Data on record at IDWR and in the table below shows that between May 6 and May 10, the flow at the 2B gage increased, and that the storage in Mackay Reservoir decreased slightly. You are correct that later in May, water was stored in Mackay Reservoir at the rates you referenced. Storage of inflow at the reservoir was possible after a sufficient amount of water was delivered to the Moore Diversion to satisfy the Jensen and Ashton rights, and because of low water demand throughout the Big Lost Valley and the fact that all water rights senior to the Mackay Reservoir storage rights were satisfied during late May.

Date	Flow at 2B (cfs)	Storage in Mackay Reservoir (af)	Date	Flow at 2B (cfs)	Storage in Mackay Reservoir (af)
5/1/2005	103	27430	5/11/2005	103	27810
5/2/2005	103	27480	5/12/2005	102	27860
5/3/2005	103	27540	5/13/2005	101	27900
5/4/2005	103	27580	5/14/2005	98	27930
5/5/2005	104	27630	5/15/2005	96	27970
5/6/2005	125	27740	5/16/2005	100	28010
5/7/2005	143	27730	5/17/2005	100	28390
5/8/2005	137	27710	5/18/2005	100	29180
5/9/2005	140	27690	5/19/2005	103	30110
5/10/2005	120	27730	5/20/2005	109	32040

General Provision 3G concerns the prohibition of rotation of natural flow water rights located below the reservoir into storage when the river is connected and rights above the reservoir are curtailed. The Department fails to understand the applicability of this reference to Antelope Creek. Again, there are no general provisions decreed in the Snake River Basin Adjudication or any former decrees that provide for separate administration of Antelope Creek, nor are there time periods in which rights on Antelope Creek can be diverted out of priority with respect to rights on the Big Lost River. A futile call

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determination on Antelope Creek is the only method in which rights on Antelope Creek and tributaries could be diverted out of priority to rights on the Big Lost River.

Please call if you have questions or wish to discuss these issues further.

Sincerely,



Gary Spackman

Water Allocations Bureau Chief

attachments:

Letter to Bob Duke from IDWR RE: Antelope Creek Regulation and Futile Call Determination
Copy of Water District 34 Guidelines for Operation - Section 7.6

cc: IDWR Eastern Region – Idaho Falls
Bob Duke – Watermaster WD 34
Mitchell Sorenson - 3871 W 2500 N, Moore 83255
Loy Pehrson – Rt 1 Box 48, Darlington 83255
Richard Reynolds – 2800 N 3233 W, Arco 83213
Darrell McDonald – PO Box 102, Arco 83213-0102
Seth Beal - 2827 N 3375 W, Moore 83255